IT 95-13
Tax Type: INCOME TAX
Issue: Penalty Under 1002(d) – Failure To File/Pay Withholding

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
ADMINISTRATIVE HEARINGS DIVISION
CHICAGO, ILLINOIS

THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS	)	
	)	No.
v.	)	SSN:
XXXXX and XXXXX, Responsible Officers of XXXXX	)	
Taxpayer	)	

RECOMMENDATION FOR DISPOSITION

APPEARANCES: XXXXX for XXXXX; XXXXX, for XXXXX; Colin B. Relphorde for the Department of Revenue.

SYNOPSIS: The instant case arose from an audit of XXXXX, a limited partnership, due to the failure of the business to withhold and remit withholding taxes of its employees for the 2nd, 3rd and 4th quarters of 1986, in the total amount of $13,487.64. Illinois 941 returns were filed for the quarters in question but no taxes were remitted. As a result, Notices of Deficiency were issued to both XXXXX and XXXXX as responsible officers of the partnership/corporation pursuant to Section 1002(d) of the Illinois Income Tax Act, (35 ILCS 5/1002(d)). The deficiencies were issued on June 7, 1989, for XXXXX, and on October 6, 1989, for XXXXX in the amount of $13,487.64.

After protest and a consolidated hearing, it is recommended the issue of liability be resolved in favor of both Taxpayers.

The issues presented for review are:

Whether Taxpayers were responsible officers/persons of XXXXX and thereby required to collect, truthfully account for and pay over the

withholding taxes due and if so, whether Taxpayers willfully failed to do so, thereby creating personal liability for such taxes under the provisions of Section 1002(d).

FINDINGS OF FACT:

1. On January 1, 1986, XXXXX (hereinafter "the Partnership") was formed pursuant to a Certificate of Partnership executed by a General Partner, XXXXX by XXXXX as president and XXXXX. The Certificate was also executed by a Limited Partner, XXXXX by XXXXX, General Partner (Tr. P. 34, XXXXX Ex. No. 6). The XXXXX which was incorporated in 1984 had assigned all of its assets to the Partnership on January 1, 1986 through an assignment executed by XXXXX as president of the Corporation. All the funds in the escrow account that were to be used to discharge federal tax liabilities were not transferred to the Partnership. Also, the Partnership did not assume:

a. Loans to the Corporation by the Shareholders;

b. Accrued but unpaid salaries to XXXXX and XXXXX;

c. All accounts payable to the law firm of XXXXX; and

d. Federal and State tax obligations to date (Txp. Ex. No. 2; Tr. P. 119).

The Partnership was engaged in the business of providing computer aided design services to customers and to provide access to computer hardware and software. The principal office of the Partnership was located at XXXXX, Chicago, Illinois (Tr. p. 30; DOR Ex. No. 6, XXXXX Ex. No. 4). The business had 10 to 20 employees in 1986 (Tr. p. 55).

XXXXX (hereinafter "the Corporation") was designated the General Partner and Managing General Partner of the Partnership with its principal office at the same address. Also, XXXXX (hereinafter "PCAD"), the Limited Partner of the Partnership was located in the same office as the Partnership and Corporation (XXXXX Ex. No. 6; Tr. P. 34).

2. On February 2, 1986, XXXXX executed a corporate promissory note

in the amount of $30,000.00 as vice-president of the Corporation payable to XXXXX and XXXXX with a maturity date of 9/1/86 (XXXXX Ex. No. 1). On the same date XXXXX and XXXXX executed a promissory note in the amount of $30,000.00 to XXXXX with a maturity date of 9/3/86 (XXXXX Ex. No. 2).

3. On April 29, 1986, XXXXX had a conference with XXXXX, XXXXX and XXXXX regarding the need to raise capital for the business (Tr. p. 107; Txp. Ex. No. 1).

4. On May 27, 1986, XXXXX issued a letter to XXXXX investors requesting an additional $360,000.00 in capital for the Partnership due to IRS tax collection pressure (Txp. Ex. No. 2).

5. On June 13, 1986, a First Amendment to the Limited Partnership Certificate of the Partnership was executed by the Corporation as Managing General Partner by XXXXX (hereinafter "XXXXX"), vice-president and by XXXXX as General Partner of the Partnership. Also, the Amendment was executed by XXXXX as a Class A Limited Partner by XXXXX and by XXXXX as vice-president of the Corporation as Class AA Limited Partners. The purpose of the Amendment was to reflect the designation of the existing Limited Partner as the Class A Limited Partner and the admission of additional Limited Partners designated as Class AA Limited Partners. Also, a schedule of capital contributions of the Class AA Limited Partners was attached. The relevant contributions were as follows:

XXXXX $85,769.00

Total Contributions were listed at $208,440.00 (XXXXX Ex. No. 5).

6. On June 26, 1986, XXXXX issued 3 checks from an escrow account at XXXXX, payable to the IRS for Corporation tax liabilities in the following amounts;

12/31/84 $62,324.05
3/31/85 $59,557.52
12/31/85 $52,734.92

(Txp. Ex. No. 4).

7. On November 19, 1986, a Revised First Amendment to the Limited Partnership Certificate was executed by the Corporation as General Partner

by XXXXX as vice-president and XXXXX. It was also executed by PCAD as the Class A Limited Partner by XXXXX as General Partner and by XXXXX as vice-president of the Corporation and a Managing Partner of the Corporation on behalf of the Class AA Limited Partners. The purpose of the Revised Amendment was to amend the list of capital contributors. The relevant contributions were as follows:

XXXXX	$64,169.00
XXXXX XXXXX	$ 8,000.00

Total contributions were listed at $247,720.00.

(XXXXX Ex. No. 4).

8. Illinois 941 returns were completed and filed on behalf of the Partnership under FEIN XXXXX in the following manner:

Quarter	Amount	Signature	Date Signed
1/Q/86	$ 195.00	L. XXXXX	04/20/86
2/Q/86	4,410.27	L. XXXXX	07/29/86
3/Q/86	3,970.88	L. XXXXX	10/09/86
4/Q/86	5,107.37	L. XXXXX	01/31/87

XXXXX XXXXX executed the IL-941 returns as General Partner (XXXXX Ex. No. 8).

9. The 1985 Annual Corporation report for the Corporation dated 1/15/85 and executed by XXXXX as president, was attested to by XXXXX as secretary and disclosed the following:

XXXXX	President, Director
XXXXX XXXXX	Secretary, Vice-President/Treasurer
XXXXX XXXXX	Asst. Secretary

(XXXXX Ex. No. 3).

10. In 1986 the Corporation's officers and directors were:

XXXXX XXXXX	Vice-President & Treasurer
XXXXX	Assistant Secretary
None	President
XXXXX XXXXX	Director
XXXXX	Director
XXXX	Director and
XXXXX XXXXX	Director

(Tr. p. 39).

11. On May 8, 1990, a Memorandum was sent to Income Tax Legal from

the Springfield Collection Services Division advising the Legal Division of the basis of the issuance of the subject 1002(d) penalties against XXXXX XXXXX for the following reasons:

a. 1985 annual report disclosing XXXXX as an officer; and

b. XXXXX's Protest naming XXXXX as a director and shareholder (XXXXX Ex. No. 7).

12. On June 7, 1989, a Notice of Deficiency was issued by the Department to XXXXX regarding the Partnership's unpaid withholding taxes pursuant to Section 1002(d). The deficiency total was $13,487.64 for the following quarters:

2/Q/86	$4,410.27
3/Q/86	$3,970.00
4/Q/86	$5,107.00

(DOR Ex. No. 5).

13. On July 20, 1989, XXXXX filed a timely Protest to the Notice of Deficiency and requested a hearing. XXXXX contends that he was not a responsible officer within the meaning of section 1002(d).

The Protest disclosed that the law firm of XXXXX through its investment partnership, other individual partners and XXXXX, a partner, was the original sponsor and syndicator of the Partnership in 1982. The law firm syndicated capital contributions over the years. XXXXX and other investors who were either his law partners or clients contributed a majority of the capital. Also, XXXXX supervised the management of the Partnership, provided legal representative to most of the parties involved, including the XXXXX entities, and most investors and key employees had been provided by Mr. XXXXX.

XXXXX provided accounting services to the Partnership. The firm was retained by XXXXX. At all times, members of the law firm and their relatives owned at least 50% of the XXXXX.

In early 1984, the initial XXXXX Partnership experienced technical and financial difficulties so the Partnership was dissolved and reorganized as the Corporation. XXXXX was hired as the president by Director. The

Corporation continued to suffer losses. By the end of 1985, the Corporation had substantial withholding tax liabilities owed to the IRS and Illinois.

14. On June 1, 1986, XXXXX formed the new Partnership (XXXXX) which took over the Corporation's operations. The Corporation was designated the Managing General Partner of the Partnership and initially owned 95% of the Partnership prior to 1986 (Tr. p. 95, 134). In 1986 the Corporate Managing General Partner was invested with 99.9% of the business and the investors/shareholders were personally liable to an extent on bank loans in the amount of $500,000.00 and personally obligated to pay $146,000.00 of the obligations assumed by the Partnership (Tr. p. 136).

15. XXXXX was an officer of the Managing General Partner of the Partnership during the period in question, however, he was not a shareholder of the Corporation and prior to 1986 XXXXX had no equity interest in the business (Tr. p. 137).

16. On May 15, 1985, a director/shareholder meeting of the Corporation was held to discuss the mounting withholding tax problems. Additional capital was raised to satisfy the federal and state withholding liabilities.

17. In May of 1986, XXXXX again advised the officers and directors by letter of additional withholding liabilities. In September of 1985, XXXXX hired a new accounting firm to review the 7/31/85 financial statements.

18. Most of the directors and shareholders either individually or through investment entities were guarantors of loans of XXXXX. Funds were used to reduce the principal balance of the loans instead of paying the delinquent withholding taxes. XXXXX was a guarantor of approximately $15,000.00. XXXXX invested about $120,000.00 and members of his law firm in the aggregate invested approximately $600,000.00 (Tr. p. 133).

19. XXXXX was directed by XXXXX and others to disburse funds to creditors and disregard the payment of withholding taxes to avoid the

failure of the business since many of the investors were friends or clients of XXXXX and his firm.

20. Finally, XXXXX stated in his Protest that the following individuals were responsible parties for the payment of withholding taxes:

> XXXXX; officer, director and shareholder of the Corporation. He also had direct access to corporate funds and controlled the Corporation's escrow account and funds as a corporate officer. XXXXX had to approve all disbursements from the escrow account before he turned the funds over to XXXXX and directed some of the funds to be used in the operations of the business and not in payment of withholding taxes.
>
> XXXXX; active director of the Corporation. He was also owner of XXXXX, one of the largest financial printers in the country and XXXXX's largest customer. He also instructed XXXXX to continue operations.
>
> XXXXX; active director and sponsor of XXXXX as president. Also, he was a guarantor of XXXXX loans.
>
> XXXXX XXXXX; Director of the Corporation and loan guarantor. Also, he gave XXXXX his proxy for corporate decisions.
>
> XXXXX and XXXXX were accountants and shareholders of the Corporation and involved in the review of financial statements and corporate decisions.

21. In conclusions, XXXXX contended in his Protest that he was merely an employee of the Corporation and given official titles by the owners to implement their policies. The directors and shareholder had knowledge of the delinquent taxes and the ability to direct the payment of the delinquent taxes, but specifically instructed XXXXX to defer their payment to continue the business operations. The owners elected to defer the payment of withholding taxes in order to pay the Corporation's loans for which they were personally liable (DOR Ex. No. 6). Additionally, over $2 million was lost in the business of which all was deducted as corporate or partnership losses (Tr. p. 151).

22. On October 6, 1989, a Notice of Deficiency was issued to XXXXX in the same amount and for the same quarters as XXXXX (DOR Ex. No. 8).

23. On November 17, 1989, XXXXX timely filed a Protest to the Notice of Deficiency and requested a hearing. The Protest contended that XXXXX was not a responsible person of the Partnership. He was not involved in

the day-to-day operations of the business; was not a signatory on the Partnership accounts; had no involvement in the payroll of tax reporting; did not control or have knowledge of the day-to-day expenditures of the partnership; did not have the authority to designate payments to creditors; did not have a controlling interest in the Corporation; did not hire or fire employees and did not have knowledge of the subject withholding tax liabilities (DOR Ex. No. 9).

24. A consolidated hearing was held before Administrative Law Judge, James P. Pieczonka in Chicago. Special Assistant Attorney General, Colin B. Relphorde represented the Department and introduced Department of Revenue Exhibits 1-11 as the Department's prima facie case(DOR Ex. No.'s 1-11; Tr. p. 10-26). Taxpayers appeared along with their counsel as stated herein.

25. XXXXX testified at the hearing pursuant to subpoena by the Department (Tr. p.26). He stated that he was a business attorney for XXXXX and that he represented businesses and the structuring of business transactions. XXXXX syndicated the capital contributions for the original Partnership and represented XXXXX as the Corporation and Partnership until its dissolution in 19888 (Tr. p. 30).

26. XXXXX stated that the Corporation managed the day-to-day affairs of the business and its financial aspects. XXXXX XXXXX was a General Partner of the Limited Partnership and involved in the financial management and day-to-day operations of the business since January 1, 1986 (Tr. p. 36, 52). XXXXX originally was an independent accountant retained by the Corporation in 1985 by XXXXX and XXXXX (Tr. p. 52-54). XXXXX actually managed or ran the Partnership since January 1, 1986 as the General Partner thereby replacing XXXXX after his resignation in 1985 (Tr. p. 79, 88). The Corporation was passive in 1986. It had no employees and the officers were not salaried in 1986 (Tr. p. 96). The Partnership had the authority to make certain expenditures and decisions regarding employee relations (Tr. p. 37, 55, 58).

27. In 1986, XXXXX was also retained to implement a business plan to turn the business around by generating business to create cash flow and a profit (Tr. p. 67). XXXXX stated that he alone did not have the authority to direct XXXXX or XXXXX in the management of the Partnership: the Board of Directors as a whole had the authority (Tr. p. 45). Additionally, XXXXX was not a signatory on the Partnership Account (Tr. p. 162). XXXXX was the financial manager whose duties included all matters pertaining to cash, expenses, inflow, outflow, financial arrangements with employees and pricing. He had access to the general ledgers and Partnership accounts (Tr. p. 57).

28. XXXXX and XXXXX were responsible for signing Corporate Checks (Tr. p. 52) and they both received salaries as employees of the Partnership in 1986 (Tr. p. 97). However, in the event they could not carry out the general plan within the budget, they would have to convince XXXXX to raise additional capital to retire more debt (Tr. p. 66). XXXXX oversaw the payment of accounts payable regarding overdue taxes (Tr. p. 70) by raising $250,000.00 in June of 1986 and held it in an escrow account entitled "XXXXX, Escrowee, XXXXX" (Tr. p. 87). The escrow could not be released to XXXXX and XXXXX until all the contributions were deposited and the IRS was paid for delinquent taxes. The sum of $175,000.00 of Partnership capital was paid directly from the escrow account by XXXXX to the IRS for corporate liabilities due in 1985 (Tr. p. 71, 87, 164, 168; Txp. Ex. No. 4). The remaining $75,000.00 was disbursed to XXXXX and XXXXX for the Partnership in order to arrange a payment schedule with the Department for delinquent taxes (Tr. p. 72). XXXXX believed the Illinois withholding taxes were paid but did not know when and by whom (Tr. p. 75). In January of 1987, XXXXX informed XXXXX that the business was doing well but additional funds of $15,500.00 were required to satisfy the pre-1986 tax payment schedule (Tr. p. 67-78). XXXXX' initial notice of the subject deficiency was in 1989 when XXXXX received the subject Notice of Deficiency (Tr. p. 80).

29. XXXXX testified that XXXXX was an original investor in the Corporation in 1984 and later became an investor in the Partnership in 1986 (Tr. p. 49). XXXXX had no responsibilities as a director except to appear at Board meetings (Tr. p. 45) and no responsibility in operating the Partnership he was merely an investor (Tr. p. 82). XXXXX was not a signatory on the partnership accounts and had no authority to hire or fire employees and was not paid a salary (Tr. p. 99, 163).

30. XXXXX testified that he was a demographer or typesetter for XXXXX. He was responsible for production of the product, managed the staff and dealt with clients. XXXXX admitted that he was a signatory on the corporation's operating account prior to 1986 and that he paid bills of the corporation (Tr. p. 184). Subsequent to the formation of the Partnership in January of 1986, XXXXX stated that he managed the day-to-day operations and had control or use of the operating account and payroll (Tr. p. 185). A segregated account was not set up for payment of taxes. The operating account was used to pay taxes.

Mr. XXXXX had the accounting background and managed the financial aspects of the business (Tr. p. 187). XXXXX knew of some taxes being paid but later knew sufficient funds were not available to pay the accounts payable and taxes (Tr. p. 189). XXXXX and XXXXX raised additional funds to pay bills not taxes (Tr. p. 190).

XXXXX did not remember signing any tax returns in 1986 (Tr. p. 190), but did admit to signing operating account checks along with XXXXX (Tr. p. 191).

CONCLUSIONS OF LAW: I find that XXXXX offered sufficient evidence to rebut the Department's case as to his responsibility pursuant to Section 1002(d) of the IITA.

Additionally, I find that XXXXX was a responsible person under Section 1002(d) of the IITA, however, he offered sufficient evidence that he did not willfully fail to withhold or remit the subject withholding taxes to the Department.

Section 1002(d) of the Illinois Income Tax Act, Chapter 120 provides:

> Willful failure to collect and pay over Tax. Any person required to collect, truthfully account for, and pay over the tax imposed by this Act who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over. The penalties provided under subsections (a) or (b) shall not be imposed for any offense to which this subsection applies. For purposes of this subsection, the term "person" includes an individual, corporation or partnership, or an officer or employee of any corporation (including a dissolved corporation), or any member or employee of a partnership, who as such officer, employee or member is under a duty to perform the act in respect of which the violation occurs.

Ch. 120, Ill. Rev. Stat., Section 1002(d).

To be liable for penalties under Section 1002(d):

(1). The taxpayer must be found to be responsible as an officer or person to collect and remit the withheld taxes; and

(2). the failure to remit must be willful.

The courts have broadly construed the meaning of the term "responsible person". Responsibility for employment taxes is a matter of status, duty and authority, not merely knowledge concerning the existence of a corporate liability, Mazo v. United States, 591 F. 2d 1151 (5th Cir. 1979) although merely holding a corporate office is not enough to make the officer a responsible person. Liddon v. United States, 448 F. 2d 509 (5th Cir. 1971), cert denied, 406 U.S. (1972).

The Illinois Supreme Court in Department of Revenue v. Heartland Investment (1985) 106 Ill. 2d 19, 28 9185) accepted that the provisions of Chapter 120 paragraph 452 1/2 (13 1/2) are equivalent to the federal statute found at 26 U.S.C. Sec. 6672 (1982) and the provisions of Section 452 1/2 are similar to Section 1002(d).

The Illinois Supreme Court has stated that Section 452 1/2 (13 1/2) of the Retailers Occupation Tax Act "imposes personal liability on a corporate officer where...the officer fails to make such payment to the Department and it can be shown that the failure was willful and the corporation is

unable to pay the tax." Department of Revenue. v. Heartland Investments, Inc., Id. at 29. In fact, the statute renders susceptible to liability not only officers, but also "any...employees," thus significantly increasing its scope. The reasoning is rather clear, the "funds accumulated during the quarter [may provide]...a tempting source of ready cash [when the corporation is] beleaguered by creditors." Slodov v. U.S. 436 U.S. 238, 243 (1978). Given such, the underlying policy of the statute primarily addresses the intentional diversion of monies held for the public treasury, rather than serving as a statute delineating the duties of officers or employees. Thus, the person who can be held responsible is one exercising control or has the ability to exercise control over the accumulated monies, not one merely having assumed a particular title in the corporation's structure.

Any analysis, therefore, must be rooted in determining whether a particular individual wields "significant control over the business affairs of the corporation, or who participate[s] in decisions regarding what bills should or should not be paid and when." Ackerman v. U.S., 85-1 USTC. (DCT Cen Dist. Calif) paragraph 87946, 87999.

In Jay v. U.S., No. 87-1413, January 23, 1989, where the government failed to establish as a matter of law liability of company bookkeeper who used taxes withheld from employees' wages to pay other company creditors pursuant to instructions of company president, the Court cited the five matters of fact to be relied on in determining who is a responsible person:

1) The identity of the officers, directors, and shareholders of the corporation;

2) The ability of the individual to sign checks of the corporation;

3) The duties of the officer as outlined by the corporate by laws;

4) The identity of the individuals who have the power to employ and dismiss persons occupying position important to remitting tax monies; and

5) The identity of the individuals in control of the

financial affairs of the corporation.

Noting the above, the first four matters of fact are easily determined, however, the fifth is subject to wide interpretation.

Authority and control of the financial affairs of a corporation has been discussed in a number of cases. The Seventh Circuit in Monday v. U.S. (1970) 421 F.2d 1210 stated that a "responsible person" may be an official "charged with general control over corporate business affairs who participate[s] in decisions concerning payment of creditors and dispersal of funds." 1214-15 (1970).

Also, the Sixth Circuit, in Gephart v. U.S., 818 F.2d 469 (1979) stated:

> "It is well established that the test for determining the responsibility of a person under Section 6672 is essentially a functional one, focusing upon the degree of influence and control which the person exercised over the financial affairs of the corporation."

See also U.S. v. Davidson (WD Mich 1983) 558 F. Supp 1048, 1052.

The focus is upon the quality of the control exercised, rather than simply its frequency. Thus, while daily supervision and direction would be sufficient, such a showing is not necessary to establish the actor's financial control of the corporation. Cooperman v. U.S. (EDNY 1978) 78-2 USTC paragraph 9578. It is the "power to compel or prohibit the allocation of corporate funds" which is the key to finding responsibility. Pototsky v. U.S. 8 CICH 308, 85-1 USTC paragraph 9458 at 88, 212. Further, the role of the individual must be found significant in the corporate structure; the possibility or occurrence of control exercised by others does not insulate such an individual, as it is not necessary to establish his or her exclusive authority. Alioto v. U.S. (ND Cal. 1984) 593 F. Supp 1402, 1408. Thus, an employee may not possess the same general authority as that held by officers or directors, but may nonetheless be determined responsible because he had greater management responsibilities. Gephart at 474.

In Scott v. U.S. 173 Ct. Cl. 650 (1965) 354 F.2d 292, 296, the Court stated:

> Realistically read, [Section 6672] encompasses all those who are so connected with a corporation as to have the responsibility and authority to avoid the default which constitutes a violation, even though liability may thus be imposed on more than one person.

Also, an individual may, directly or by consensus, dictate the appropriation of funds through establishing general policies or regulations, it is reasonable to propose that an officer or employee that implements such directives is a candidate for responsibility. The Court in Monday referred to the "power and responsibility within the corporate structure for seeing that the taxes ... are remitted to the Government" 421 F.2d at 1214-15. Emphasis added. Additionally, the Court in Gephart stated even if certain individuals were more responsible than plaintiff and exercised greater authority, it does not affect a finding of liability against plaintiff.

The court concluded that the statute "does not confine liability for unpaid taxes only to the single officer with the greatest or the closest control or authority over corporate affairs." Id. See also Bolding v. U.S. (Ct. Cl. 1977) 565 F.2d 663, 671.

Finally, significant control over the business affairs of the corporation or participation in decisions regarding what bills should or should not be paid and when is required. See, e.g. Turner v. United States [701-1 USTC paragraph 1982], 423 F.2d 448, 449 (9th Cir. 1970). Also, control has been defined as the authority to direct or control the payment of corporate funds. Wilson v. United States [57-2 USTC paragraph 20, 0401], 250- F.2d 312, 316 (9th Cir. 1958).

"Authority" refers to effective authority. In other words, a court must determine whether the defendant was a person who could have seen to it that the taxes were paid, i.e., a person with ultimate authority over which corporate obligations were paid who can fairly be considered responsible for the corporation's failure to pay its taxes. Liddon, (supra.)

On this record, the evidence has shown that XXXXX did not have the

authority to ensure the payment of the subject withholding taxes. XXXXX was not a signatory on any of the Partnership accounts, was a minority shareholder of the General Partner-Corporation and merely an investor. Consequently, XXXXX was not a responsible officer under Section 1002(d).

As to XXXXX, the record has shown that facts exist which establish that XXXXX was a responsible officer of the XXXXX Partnership.

XXXXX was an officer of the General-Partner Corporation and ran the day-to-day production operations of the business. Additionally, he admitted that he was a signatory on the Partnership operating account and signed checks and payroll during the quarters in question.

Although XXXXX was not a shareholder of the Managing-General Partner corporation, he had the authority and control to operate the business along with XXXXX per their management agreement. XXXXX in his Protest placed the blame upon other officers and directors, however, such blame does not abate his responsibility.

The law is clear that more than one officer may be a responsible officer for purposes of withholding penalties, the statute does not limit liability to one person (Scott, supra). Taxpayer cannot place the blame on other officers in an effort to relieve himself of liability. A person who can be held responsible is one exercising control or has the ability to exercise control over the accumulated monies of the company (See Slodov v. U.S., supra). Surely, XXXXX was such a person.

Additionally, daily supervision and direction is not necessary to establish taxpayer's financial control of the corporation (Cooperman v. U.S.); XXXXX had and exercised the "power to compel or prohibit the allocation of corporate funds" which is the key to finding responsibility (Pototzky v. U.S.). XXXXX, either through his dedication, trustworthiness, management contract and/or reliability had the duty to operate the business with his input and direction at times.

In short, XXXXX cannot escape liability as a responsible officer/person by simply placing the blame on other officers or directors.

XXXXX was in a position of a responsible person and the record has shown that he conducted himself as such in the operation and financial policies or procedures. Having met the responsibility requirement under the statute, it must be determined if XXXXX willfully failed to remit the withholding taxes to the Department.

The Court in Young v. IRS 85-1 USTC paragraph 87521, 526 formulated a general definition of the term "willful" as it would apply to Section 6672: It encompasses voluntary or intentional acts, or actions exhibiting a reckless disregard of a known or a obvious risk that tax monies have not been remitted to the taxing entity. Also, the concept of "willfulness" relates to an intentional design not to remit collected monies, or, voluntary or reckless actions, such as paying creditors with extremely limited funds which clearly and necessarily would result in tax monies not being remitted. Brown v. U.S. (NDIll 1982) 552 F. Supp. 662, 664; Scott v. U.S. 354 F.2d 292.

The presence of voluntary, intentional, or reckless conduct is "an issue of fact to be determined by the trier of [sic] fact on the basis of the circumstances and evidence adduced in the particular case." Department of Revenue v. Bublick 68 Ill. 2d 568, 576 (1977).

In the case at hand, XXXXX contended that his conduct in 1986 for the Partnership was not willful. XXXXX argued that he did not have control of the Partnership to expend the funds for payment of taxes. He was not a shareholder of the Managing General Partner Corporation. He did not have access to the capital contributions which were placed in an escrow account under the control of XXXXX and paid out by XXXXX. He was required under this management contract to operate the business as an employee. XXXXX ran the financial aspects of the Partnership and executed the subject IL-941 returns. Additionally, XXXXX had no control of the funds or sole discretion in their disbursement. He was directed by XXXXX to pay creditors instead of taxes to perpetuate the business (Tr. p. 142, 144).

The Administrative Law Judge agrees with XXXXX's contention that his conduct was not willful during the quarters in question.

On this record, it was shown that XXXXX along with several other partners in his firm and their clients had invested millions of dollars in the business (possibly as a tax shelter as implied by XXXXX), and had personal guarantees regarding the Corporation's liabilities. The Partnership raised capital to relieve the corporate liabilities without involvement or control by XXXXX. The corporate/partnership structure which was managed by XXXXX was too complex for XXXXX to have independent discretion or authority. On this record, XXXXX's willfulness was not proven. Although XXXXX had knowledge of the delinquencies, he did not have the requisite control to ensure their payment. In fact he was instructed by XXXXX to pay creditors instead of taxes to perpetuate the Partnership and protect the loan guarantors. Under the instant circumstances, the record did not contain sufficient facts to show that XXXXX was reckless or he voluntarily or intentionally failed to remit the withholding taxes due to the Department. Therefore, XXXXX did not willfully fail to remit the withholding taxes due.

In conclusion, XXXXX's actions were not willful to render him liable as a responsible officer/person for the Section 1002(d) penalties for the entire period in question.

RECOMMENDATION: The Administrative Law Judge recommends that the Director of Revenue withdraw the Notices of Deficiency in their entirety against XXXXX and XXXXX for the quarters in question.

James P. Pieczonka
Administrative Law Judge

Dated: